NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0808

STATE OF LOUISIANA

VERSUS

KYRON FOLSE

Judgment Rendered: DEC 2 2 2016

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, State of Louisiana
Trial Court Number 542902

Honorable Christopher J. Boudreaux, Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

WHIPPLE, C.J.

The defendant, Kyron Folse, was charged by bill of information with attempted armed robbery, a violation of LSA-R.S. 14:64 and LSA-R.S. 14:27, and pled not guilty. After a trial by jury, he was found guilty as charged. The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial. The defendant was sentenced to twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. He now appeals, assigning error to the sufficiency of the evidence in support of the conviction. For the following reasons, we affirm the defendant's conviction and sentence.

STATEMENT OF FACTS

On the night of June 2, 2015, officers of the Lafourche Parish Sheriff's Office (LPSO) responded to the scene of an attempted armed robbery reportedly occurring at a trailer home located at 624 Market Street in Raceland. The victim, Vontrell Duncan, arrived home at approximately 9:40 p.m., backed his truck into the driveway, and observed two armed males as they suddenly appeared from behind the trailer and pulled out guns. As he opened his truck door and placed one foot on the ground, they held him at gunpoint and demanded money. The victim turned his pockets inside out, held his hands up, and told the perpetrators that he did not have any money. The victim's mother, Mamie Lewis, came outside and yelled that she was going to call the police, and the perpetrators ran across the street. As they fled, gunshots were fired.[1] After the police arrived on the scene, the victim identified the defendant and Jassumen Price[2] as the perpetrators.

[1]The record is unclear as to whether one or both of the perpetrators fired their weapons.

[2]The defendant was charged and tried alone. The record does not indicate a charge or disposition for the named co-perpetrator in this case.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence is insufficient to support the verdict. The defendant does not contest that the instant crime was committed, but argues that the State failed to negate the possibility of misidentification. The defendant notes that there was no physical evidence of his guilt. He argues that the victim's testimony was largely inconsistent. The defendant contends that the victim initially claimed the perpetrators' faces were covered by bandanas and later stated that the bandanas were around their necks and did not cover their faces. The defendant also notes that the victim did not mention any names or nicknames during the 911 call, although he claimed that he knew the defendant at the time of the offense and recognized him as one of the perpetrators. The defendant further notes that the victim consulted with unnamed individuals at the scene before naming the defendant and Price as the perpetrators, and was subsequently shown individual photographs of the defendant and Price as opposed to a complete photographic lineup. The defendant also contends that it was dark outside, that the incident was brief, and that the victim did not have the opportunity to get a good look at the perpetrators' faces. The defendant contends that accordingly, the victim's identification of him as one of the perpetrators is not trustworthy.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, enunciated in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime charged and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. State v. Jones, 596 So. 2d 1360, 1369 (La. App.

1st Cir.), writ denied, 598 So. 2d 373 (La. 1992). The Jackson standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. State v. Graham, 2002-1492 (La. App. 1st Cir. 2/14/03), 845 So. 2d 416, 420.

Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. LSA-R.S. 14:64(A). Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended. LSA-R.S. 14:27(A). Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982).

Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. State v. Johnson, 99-2114 (La. App. 1st Cir. 12/18/00), 800 So. 2d 886, 888, writ denied, 2001-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. State v. Weary, 2003-3067 (La. 4/24/06), 931 So. 2d 297, 311, cert. denied, 549 U.S. 1062, 127 S. Ct. 682, 166 L. Ed. 2d 531 (2006), quoting State v. Neal, 2000-0674 (La. 6/29/01), 796 So. 2d 649, 658, cert. denied, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002);

State v. Davis, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So. 2d 161, 163. Moreover, unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. State v. Marshall, 2004-3139 (La. 11/29/06), 943 So. 2d 362, 369, cert. denied, 552 U.S. 905, 128 S. Ct. 239, 169 L. Ed. 2d 179 (2007); State v. Thomas, 2005-2210 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So. 2d 683.

In the instant case, the record reflects that Kelly Gray lived in a trailer located directly across the street from the victim and his mother. Gray was in his front yard working on his truck when he noticed two males pacing back and forth in front of the victim's trailer and recognized one of them as Price. Gray noted that Price had been conversing with Gray's brother, and Gray and his brother knew Price's grandmother (whom Gray referred to as Shaky Price). While Gray did not see the face of the other individual, he noted that the person had short dreadlocks and was wearing a hoodie that partially covered his head. Gray was somewhat familiar with the defendant and vaguely recalled him having dreadlocks. While in his shed, Gray heard a "pop" three times and saw two individuals running alongside his fence. He went inside his house and heard more noises (described as "boom, boom"), followed by Lewis screaming and hollering, "Call the police. Call the police." He saw the victim in tears and visibly shaken up.

Mamie Lewis did not see the perpetrators' faces or recognize them. She was watching television when she heard her son, the victim, drive up in his truck. As she got up to clean up after dinner, she heard a noise followed by the victim stating that he did not have anything. She went to the front door and saw two black males holding the victim at gunpoint as he was getting out of his truck. She noted that the victim had one foot out of his truck and his pockets were turned inside out, as he held his hands up. After she yelled that she would call the police,

causing the individuals to flee, Lewis heard the gunshots and called 911. Lewis briefly spoke to the dispatcher before passing the phone to the victim. Lewis then went across the street and started knocking on Gray's door, and asked if they had heard the shots. Lewis testified that while they waited for the police, the victim told her that he knew the individuals and said that their nicknames were "Pscyho" and "Jazz."

On the night of the incident, the victim had visited his friend Ronald Price, stopped at a store, and then went home. The victim testified that the driveway was sufficiently lit by a "spotlight" on a pole when he was approached by the perpetrators. As the perpetrators demanded money, the victim was close enough to them to see who they were. The victim identified the defendant in court as one of the perpetrators. The victim stated he knew the defendant as "Sike" and would often see him in the neighborhood and other places. The victim testified that the defendant's hair was different by the time of the trial, specifically noting that the defendant no longer had dreadlocks with blond tips like he did at the time of the offense. The victim noted that at the time of the offense, the defendant was wearing all-black clothing, a head cap that covered his earlobes, and a bandana. However, he further testified that the defendant's hair, eyes, cheekbones, and nose were visible. The victim was familiar with the defendant's voice prior to the offense, and recognized the defendant's voice as he demanded money. The victim testified that he knew the co-perpetrator as Jassumen or "Jazz," but could not recall his last name. After his mother yelled out to the perpetrators, the victim heard the defendant yell "Shoot him. Shoot him[,]" and the perpetrators then fled. The victim ducked down to the ground after hearing the gunshots. The victim confirmed that the perpetrators ran across the street toward Gray's trailer, alongside his fence.

During the 911 call, the victim repeatedly told the dispatcher that he knew the perpetrators who shot at him, that he did not know their real names, but that he knew their nicknames and would be able to ascertain their real names. The dispatcher informed the victim that the police were approaching, but did not request the nicknames. Consistent with the 911 call, the victim testified that he did not know the perpetrators' real names when he spoke to the 911 dispatcher, and that he used their nicknames to ascertain their real names from bystanders who approached after the incident.

After the victim provided the police with the defendant's name and Price's name, the officers showed him a photograph of each of them, and he identified them as the perpetrators.[3] The victim was interviewed on the scene by LPSO Detective Nicholas Pepper. The victim's recorded police statement on the scene, approximately two hours after the incident, was consistent with his trial testimony. He stated that the perpetrators were wearing bandanas that did not cover their faces, noting that even their mouths were uncovered. He confirmed that the photographed individuals, the defendant and Price, were the perpetrators.

LPSO Deputy Joe Fanguy noted that several people were on the scene when he arrived, but the perpetrators had fled. The victim told Deputy Fanguy that he knew the perpetrators by nickname, but was unsure of their full names. Deputy Fanguy noted that when he arrived, the victim was still ascertaining the perpetrators' last names by giving their nicknames to the people on the scene. Deputy Fanguy noted that the victim was confident that he knew the perpetrators and was merely determining their full names from those who approached the scene. After speaking to the bystanders, the victim provided the full names of the defendant and Price. Deputy Fanguy used an official database to obtain

[3]In the photograph shown to the victim, the defendant has short dreadlocks with blond tips.

photographs of the defendant and Price. Deputy Fanguy showed the victim the photograph of the defendant, and the victim made an immediate positive identification of the defendant as one of the perpetrators. The same procedure was followed with the photograph of Price.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. State v. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. Richardson, 459 So. 2d at 38. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. State v. Smith, 600 So. 2d 1319, 1324 (La. 1992). When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

The verdict rendered in this case indicates that the jury accepted the testimony presented by the State and rejected the hypothesis of innocence presented by the defendant. We note from the time of the 911 call to his testimony at the trial, the victim consistently indicated that he knew and recognized the perpetrators. The police officers who arrived on the scene noted that the victim was confident regarding the perpetrators' identities, although he had to ascertain

their full names. The victim testified that he had no doubts as to the defendant's identity. The victim consistently stated that the hoodies and bandanas did not prevent him from recognizing the perpetrators. He noted that the hoodie only partially covered the defendant's hair, and that the bandana only covered the lower part of their faces, below their mouths. The victim also knew and recognized the defendant's voice. We find that the jury was reasonable in accepting the testimony consistently detailing the offense and that the crime was committed by the defendant and Price. We cannot say that the jury's determination was irrational under the facts and circumstances presented. See State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 662. Viewing the evidence in the light most favorable to the prosecution, we are convinced that a rational trier of fact could have concluded the State negated any reasonable probability of misidentification and proved beyond a reasonable doubt that the defendant was guilty of attempted armed robbery. For the above reasons, the assignment of error is without merit.

PATENT SENTENCING ERROR

This court routinely reviews the record for patent errors pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2). After a careful review of the record in these proceedings, we have found no reversible errors. We note, however, that in accordance with LSA-C.Cr.P. art. 873, a sentence shall not be imposed until at least twenty-four hours after a motion for a new trial is overruled. In this case, before imposing sentence, the trial court did not wait twenty-four hours, or secure

a waiver of this required period, after denying the defendant's motions for new trial and for post-verdict judgment of acquittal.[4]

Nevertheless, in State v. Augustine, 555 So. 2d 1331, 1333-1335 (La. 1990), the Louisiana Supreme Court implied that a failure to observe the twenty-four hour delay provided in Article 873 will be considered harmless error, where the defendant can not show that he suffered prejudice from the violation. See State v. White, 404 So. 2d 1202, 1204 (La. 1981). In Augustine, the Louisiana Supreme Court concluded that prejudice would not be found if the defendant had not challenged the sentence imposed and the twenty-four hour delay violation was merely noted on patent error review under LSA-C.Cr.P. art. 920(2). See State v. Augustine, 555 So. 2d at 1334. In this case, the record reflects that the defendant did not file a motion to reconsider sentence.[5] Moreover, on appeal the defendant has not assigned as error the trial court's failure to observe the twenty-four hour delay, nor has he contested the sentence imposed. Accordingly, under these circumstances, we conclude that this patent sentencing error is harmless beyond a reasonable doubt and does not require a remand for resentencing. See State v. Ducre, 604 So. 2d 702, 709 (La. App. 1st Cir. 1992).

CONVICTION AND SENTENCE AFFIRMED.

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[4]Louisiana Code of Criminal Procedure article 873 does not explicitly require a twenty-four hour delay in sentencing after the denial of a motion for a post-verdict judgment of acquittal. However, this court previously has applied the twenty-four hour delay required by Article 873 to motions for a post-verdict judgment of acquittal. See State v. Coates, 2000-1013 (La. App. 1st Cir. 12/22/00), 774 So. 2d 1223, 1226; State v. Jones, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So. 2d 52, 53.

[5]The defendant merely entered a general objection to the sentencing at the hearing after imposition. A general objection to a sentence preserves nothing for appellate review. See LSA-C.Cr.P. art. 881.1(E); State v. Caldwell, 620 So. 2d 859 (La. 1993); State v. Bickham, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 891.